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No. 03-1670

In The
Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION TO AMEND PETITION FOR A WRIT OF CERTIORARI

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MOTION TO AMEND PETITION FOR A WRIT OF CERTIORARI

Eight days after William Thurston filed a petition for a writ of certiorari in this case, this Court decided *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004). In *Blakely*, the Court applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that a criminal sentence imposed under Washington state law violated the Sixth Amendment to the extent it was based on facts found by a judge rather than found by a jury or admitted by the defendant. In the wake of *Blakely*, the Court recently granted certiorari and ordered expedited briefing in *United States v. Booker*[1] and *United States v. Fanfan*[2] to decide whether the Sixth Amendment is likewise violated by imposition of an enhanced sentence under the United States Sentencing Guidelines.

Thurston's case presents the same question as *Booker* and *Fanfan*. His sentence was enhanced by twenty offense levels under the federal Guidelines based on judge-determined facts regarding the amount of intended loss associated with a conspiracy to defraud the United States, the extent of the planning associated with the conspiracy, and Thurston's role in the offense.

This case would also present a different but related Sixth Amendment question even if the Court were to reject the Sixth Amendment challenges raised in *Booker* and *Fanfan*. Through the operation of the PROTECT Act's[3] new departure-restricting provisions, as well as the First Circuit's failure to afford the breadth of departure discretion required

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[1] *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, No. 04-104, ___ S. Ct. ___, 2004 WL 1713654 (Aug. 2, 2004).

[2] *United States v. Fanfan*, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004) (partial tr. of sentencing hr'g), *cert. granted before judgment*, No. 04-105, ___ S. Ct. ___, 2004 WL 1713655 (Aug. 2, 2004).

[3] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

by *Koon v. United States*, 518 U.S. 81 (1996), Thurston was subjected to a scheme more akin to determinate sentencing. The question therefore arises whether the Sixth Amendment is offended by a system that requires a judge to find facts and impose sentence enhancements, yet simultaneously eviscerates that judge's discretion to depart to reach a just, individualized sentence.

The certiorari petition as originally filed did not include these questions because, before *Blakely*, this Court had rejected constitutional challenges to the Guidelines, and the circuit courts uniformly had rejected *Apprendi*-based challenges to the Guidelines. Accordingly, Thurston moves for leave to amend his certiorari petition by the Amendment bound herewith, in which these additional questions are presented.

This case is scheduled for the Court's consideration at its conference on September 28, 2004.

BACKGROUND

Thurston was convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and sentenced in June 2002 under the federal Guidelines. The base offense level for this crime was six. Based on facts found by the judge under a preponderance-of-the-evidence standard, not by the jury under a reasonable-doubt standard, Thurston's sentence was increased by twenty levels:

> This is my ruling with respect to the offense level. A base offense level of 6, an aggravated role in the offense which is 4, more than minimal planning which is 2, and an intended loss of 14, which adds up to an offense level of 26. That makes the range between 63 months and 78 months.

Pet. App. 203a-204a.[4] Based solely on the jury's general verdict of conspiracy to defraud, the applicable guidelines range would be zero to six months' imprisonment. *See* U.S.S.G., Sentencing Table. Once the district court imposed the enhancements, however, Thurston's sentence increased to a range of sixty-three to seventy-eight months' imprisonment, *see id.*, capped by 18 U.S.C. § 371 at sixty months. U.S.S.G. § 5G1.1(a); 18 U.S.C. § 371; 28 U.S.C. § 994(b)(1).

Thurston challenged each of these factual findings and attendant offense-level enhancements in the district court, and the fourteen-level intended-loss enhancement on appeal. Thurston's App. in 1st Cir. 1502-1520 (objections to presentence report); Gov't App. in 1st Cir. 117-125 (sentencing brief); *id.* 318-348 (oral argument at sentencing); Thurston's Opening Brief in 1st Cir. 78-84; Thurston's Reply Brief in 1st Cir. 58-61. Given the controlling authority at the time of trial, sentencing, and appeal, well before *Blakely* was decided, Thurston did not interpose a Sixth Amendment challenge to the sentencing enhancements. The sentencing judge departed downward on two grounds from offense level twenty-six to level ten, Pet. App. 212a-213a, 233a-234a, but the First Circuit reversed the departure on both grounds, remanding for imposition of the statutory maximum sentence of five years' imprisonment.

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[4] The base offense level and enhancements correlate to the following provisions of the Guidelines: United States Sentencing Commission, *Guidelines Manual* (Nov. 1992) [hereinafter U.S.S.G.] § 2X1.1(a) (providing base offense level for conspiracy to defraud is same as for fraud); *id.* § 2F1.1(a) (providing base offense level for fraud is six); *id.* § 2F1.1(b)(1) (providing for fourteen-level increase for "loss" greater than $5,000,000, up to $10,000,000); *id.* § 2F1.1(b)(2) (providing for two-level increase "[i]f the offense involved [] more than minimal planning"); *id.* § 3B1.1(a) (providing for four-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive"). The November 1992 Guidelines were used to avoid retroactivity problems.

Id. 63a-64a. Thurston filed a petition for rehearing, which the court of appeals denied on March 18, 2004. *Id.* 134a.

On June 16, 2004, Thurston timely filed his certiorari petition in this Court. Thurston's original petition, which is scheduled for consideration at this Court's conference on September 28, 2004, presents the following questions:

> 1. Whether applying the PROTECT Act to a case pending on appeal on the date of enactment contravenes statutory construction, retroactivity, and *ex post facto* doctrines.
>
> 2. Whether *de novo* review to determine whether a departure is "justified by the facts of the case" (a) is limited to consideration of extra-record sources that the district court is entitled to consider, and (b) requires affording weight to the district court's experience, expertise, and unique vantage point in sentencing.
>
> 3. Whether a district court has discretion to depart from the applicable guideline range based on a disparity between the sentences of similarly situated co-defendants, when otherwise a defendant would be prejudiced by prosecutorial manipulation of the guidelines, or punished for exercising the constitutional right to trial.

Petition For a Writ of Certiorari at i.

Eight days after Thurston filed his certiorari petition, the Court decided *Blakely v. Washington*, 124 S. Ct. 2531. On August 2, 2004, the Court granted certiorari in *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105, to decide whether the reasoning of *Blakely* means that the sentence-enhancement provisions of the federal Guidelines violate the Sixth Amendment.

Thurston seeks to amend the petition to add the following questions:

> 4. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based

> on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
>
> 5. If the answer to the question above is not an unequivocal "yes," the following question is presented: Whether imposition of such an enhanced sentence violates the Sixth Amendment when the sentencing judge's fact-intensive decision to depart from the applicable guideline range is subject to nondeferential *de novo* review, or when the sentencing judge is prohibited by law from departing based on a disparity between the sentences of similarly situated co-defendants.

Amendment to Petition For a Writ of Certiorari, bound herewith, at i. The first question is identical to the first question presented in *Booker* and *Fanfan*. The second question would arise in this case even if the Court were to reject the Sixth Amendment challenges raised in *Booker* and *Fanfan*.

ARGUMENT

Whether to grant leave to amend a timely petition for certiorari is not a jurisdictional question, but rather a matter within this Court's discretion, considering all the circumstances. Bennett Boskey, *Supreme Court*, *in* 1 West's Federal Forms § 142 (4th ed. 1992); *see also* Sup. Ct. R. 21 (providing for motions to the Court). The Court has allowed such amendments to petitions, including in cases in which certiorari was granted. *See, e.g.*, *Hall v. Texas*, 536 U.S. 955 (2002); *Paris Adult Theatre I v. Slaton*, 408 U.S. 921 (1972); *Alderman v. United States*, 394 U.S. 165 (1969) (Court granted motion to amend petition to raise issue similar to that presented in another case before Court); *Bates v. Nelson*, 393 U.S. 16 (1968) (per curiam) (concurrent with grant of motion to amend and of petition, Court vacated judgment and remanded case for further consideration in light of recent decisions by Court in other cases); *Continental Oil Co. v. Federal Power Comm'n*, 388

U.S. 906 (1967); *Costello v. United States*, 365 U.S. 265, 284 (1961); *Slusser v. Ellis*, 344 U.S. 807 (1952); *cf. also Northeast Bancorp, Inc. v. Bd. of Governors of Federal Reserve System*, 472 U.S. 159, 176-77 (1985) (exercising discretion to decide issue first raised in supplemental brief after being abandoned in certiorari petition and merits briefs).

This case presents compelling circumstances that favor allowing Thurston to amend his petition to add the identical question presented in the *Booker* and *Fanfan* cases, as well as a different but related Sixth Amendment question. The first Sixth Amendment question is squarely presented by this case, just as it is in *Booker* and *Fanfan*. At sentencing, the judge enhanced Thurston's sentence by twenty levels under the Guidelines: fourteen levels for "intended loss," two levels for "more than minimal planning," and four levels for "aggravating role in the offense." Pet. App. 203a-204a. *See supra* at 2-3 & n.4. These facts were not found by a jury beyond a reasonable doubt, nor were they admitted by Thurston. Instead, they were found by the judge under a preponderance-of-the-evidence standard. Thurston contested these enhancements—in his objections to the presentence report, in his sentencing brief, during oral argument at sentencing, and on appeal. *See supra* at 3. Not only was Thurston's sentence enhanced in the first instance, but the sentencing judge's downward departure, which offset sixteen of the twenty levels of enhancements, was reversed by the court of appeals under a nondeferential *de novo* review standard that the court interpreted the PROTECT Act to require. Thus, the second Sixth Amendment question would be presented here even if the Court rejected the Sixth Amendment challenges made in *Booker* and *Fanfan*.

Blakely represented "a sea change in the body of sentencing law," *United States v. Ameline*, 376 F.3d 967, 973 (9th Cir. 2004), and, absent leave to amend, Thurston will be prejudiced by unfortunate timing that was completely beyond his control. Thurston filed his certiorari

petition on June 16, the last day he could do so under this Court's Rule 13. Sup. Ct. R. 13.1, 13.3 (certiorari petition must be filed within 90 days of court of appeals' denial of petition for rehearing); *see also* Sup. Ct. R. 13.5 ("An application to extend the time to file a petition for a writ of certiorari is not favored."). Eight days later, on June 24, the Court decided *Blakely*. 124 S. Ct. 2531. The Court revisited the rule it had announced in *Apprendi*: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490). The Court held:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

124 S. Ct. at 2537 (emphasis in original) (internal citations omitted). One court has stated that "*Blakely* redefined 'statutory maximum.'" *Booker*, 375 F.3d at 514; *see also Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting) (explaining the "[u]nder the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense" and "must now be charged in an indictment and submitted to a jury").

As Justice O'Connor correctly noted, "there is no map of the uncharted territory blazed by [the Court's] unprecedented holding" in *Blakely*. *Id.* at 2547 n.1 (O'Connor, J., dissenting). Despite the fact that the Court in *Apprendi* expressly declined to discuss the federal Guidelines, 530 U.S. at 497 n.21, shortly after that decision, defendants argued that enhancements under the Guidelines based on a judge's factual findings violated the Sixth Amendment. Every court of appeals with criminal jurisdiction rejected

that argument in the year or two after *Apprendi*,[5] and reaffirmed that position after this Court applied the *Apprendi* rule in *Ring v. Arizona*, 536 U.S. 584 (2002).[6]

For example, the First Circuit, the court that heard Thurston's appeal, had concluded by early 2001 that

> *Apprendi* simply does not apply to guideline findings (including, inter alia, drug weight calculations) that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum. In other words, even after *Apprendi*, the existence *vel non*

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[5] *See, e.g.*, *United States v. Caba*, 241 F.3d 98 (1st Cir. 2001); *United States v. Norris*, 281 F.3d 357 (2d Cir. 2002); *United States v. DeSumma*, 272 F.3d 176 (3d Cir. 2001); *United States v. Mack*, 229 F.3d 226 (3d Cir. 2000); *United States v. Kinter*, 235 F.3d 192 (4th Cir. 2000); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000); *United States v. Tarwater*, 308 F.3d 494 (6th Cir. 2002); *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000); *United States v. Diaz*, 296 F.3d 680 (8th Cir. 2002); *United States v. Ochoa*, 311 F.3d 1133 (9th Cir. 2002); *United States v. Jackson*, 240 F.3d 1245 (10th Cir. 2001); *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001); *United States v. Nealy*, 232 F.3d 825 (11th Cir. 2000); *United States v. Fields*, 251 F.3d 1041 (D.C. Cir. 2001).

[6] *See, e.g.*, *United States v. Casas*, 356 F.3d 104 (1st Cir. 2004); *United States v. Goodine*, 326 F.3d 26 (1st Cir. 2003); *United States v. Luciano*, 311 F.3d 146 (2d Cir. 2002); *United States v. Parmelee*, 319 F.3d 583 (3d Cir. 2003); *United States v. Cannady*, 283 F.3d 641 (4th Cir. 2002); *United States v. Floyd*, 343 F.3d 363 (5th Cir. 2003); *United States v. Randle*, 304 F.3d 373 (5th Cir. 2002); *United States v. Helton*, 349 F.3d 295 (6th Cir. 2003); *United States v. Merritt*, 361 F.3d 1005 (7th Cir. 2004); *United States v. Johnson*, 335 F.3d 589 (7th Cir. 2003) (per curiam); *United States v. Banks*, 340 F.3d 683 (8th Cir. 2003); *United States v. Piggie*, 316 F.3d 789 (8th Cir. 2003); *United States v. Toliver*, 351 F.3d 423 (9th Cir. 2003); *United States v. Mendez-Zamora*, 296 F.3d 1013 (10th Cir. 2002); *United States v. Ortiz*, 318 F.3d 1030 (11th Cir. 2003); *United States v. Pettigrew*, 346 F.3d 1139 (D.C. Cir. 2003); *accord Blakely*, 124 S. Ct. at 2547 n.1 (O'Connor, J., dissenting) (collecting federal and state authority, and explaining that "[p]rior to today, only one court [the Kansas Supreme Court, reviewing Kansas state law] had ever applied *Apprendi* to invalidate application of a guidelines scheme").

> of sentencing factors that boost a defendant's sentence but do not trip a new statutory maximum remain grist for the district judge's mill under a preponderance-of-the-evidence standard.

United States v. Caba, 241 F.3d 98, 101 (1st Cir. 2001) (citations omitted) (holding *Apprendi* not violated where sentence enhanced based on judge's finding of drug quantity, which defendant was acquitted of possessing, and finding that defendant was "organizer or leader" of conspiracy). Because a court is prohibited from imposing a Guidelines sentence that exceeds the maximum provided by statute for the offense of conviction, U.S.S.G. § 5G1.1(a); 28 U.S.C. § 994(b)(1), this reasoning effectively meant that no judicial fact-finding in the application of the Guidelines could ever be successfully challenged on *Apprendi* grounds. Well before Thurston was tried or sentenced, the First Circuit had already rejected such *Apprendi*-based challenges to Guidelines calculations "on numerous occasions" and made clear that "[its] jurisprudence on this point has been well-established." *United States v. Campbell*, 268 F.3d 1, 7 & n.7 (2001); *see also United States v. Goodine*, 326 F.3d 26, 33 (1st Cir. 2003) ("Nothing in *Apprendi* or subsequent cases calls into question the validity of the Sentencing Guidelines, and we do not believe that the Court would have set in motion such a sea change in the law of sentencing without explicitly addressing the issue.") (internal quotation marks and citation omitted).

In addition to the circuit courts' uniform precedent rejecting *Apprendi*-based, Sixth Amendment challenges to the Guidelines, this Court had, by the time of Thurston's trial and sentencing, considered and rejected a number of constitutional and other challenges to sentences imposed under the Guidelines, none of which suggested the Guidelines' demise. *See, e.g.*, *Edwards v. United States*, 523 U.S. 511 (1998); *United States v. Watts*, 519 U.S. 148 (1997) (per

curiam); *Witte v. United States*, 515 U.S. 389 (1995); *United States v. Dunnigan*, 507 U.S. 87 (1993).[7]

Given the controlling authority at the time he filed his petition, before *Blakely*, Thurston reasonably did not present the question of whether his sentence was imposed in violation of the Sixth Amendment. But now, *Blakely*'s reasoning gives rise to a straightforward argument that Thurston's sentence violated his right to trial by jury. The Court should afford him the opportunity to make this argument while his case is still on direct review.

The fact that Thurston did not mount a Sixth Amendment challenge in the district court or court of appeals before *Blakely* poses no obstacle to this Court's allowing amendment of the petition. This Court's constitutional decisions, including those announcing new rules, apply retroactively to all cases pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314 (1987). Although the Court normally does not review an issue not pressed or passed on below, in exceptional cases, it will. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540-41 (1999) (resolving legal standard although court below did not reach issue); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (deciding question not pressed, although decided, below, because the issue was "in a state of evolving definition and uncertainty, and one of importance to the administration of federal law") (internal quotation marks and citations omitted); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (deciding question of law even though not addressed by lower court); *Nixon v.*

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[7] The government has taken the position that "[t]his Court could not hold that *Apprendi* applies to the Guidelines without disavowing *Edwards*, as well as *Watts*, *Witte*, and *Dunnigan*, and saying that the Court has 'recently discovered a constitutional principle rendering unconstitutional all the sentencing practices affirmed in those decisions.'" Nos. 04-104, 04-105, Brief for the United States at 38 (quoting *United States v. Emmenegger*, No. 04 CR. 334 (GEL), 2004 WL 1752599, at *11 (S.D.N.Y. Aug. 4, 2004)).

Fitzgerald, 457 U.S. 731, 743 n.23 (1982) (same); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (deciding question not pressed or decided in district court or court of appeals, because "[i]t [was] an important, recurring issue and [was] properly raised in another petition for certiorari being held pending disposition of this case," and "the interests of judicial administration will be served by addressing the issue on its merits").

Whether this issue in this case will ultimately be reviewed under a harmless-error or a plain-error standard should not affect the ruling on this motion. Even if Thurston were deemed to have forfeited this claim of error in the courts below,[8] this Court could allow the petition to be amended, and ultimately grant certiorari. The Court has overlooked the plain-error rule and reached the merits when confronted with a question that is "currently in a state of evolving definition and uncertainty[,] . . . is important[,] and appears likely to recur." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256-57 (1981) ("conclud[ing] that restricting our review to the plain-error standard would serve neither to promote the interests of justice nor to advance efficient judicial administration"). Moreover, even when a party does not successfully move to include a question in the certiorari petition, "the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to

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[8] Thurston does not concede forfeiture in the circumstances presented here. He strongly objected to and thoroughly argued against the twenty-level sentence enhancements under U.S.S.G. §§ 2F1.1(b)(1), 2F1.1(b)(2), and 3B1.1(a) before they were imposed. The government has taken inconsistent positions on whether failure to object in the district court on *Apprendi* grounds constitutes forfeiture in similar circumstances. *Compare Booker*, 375 F.3d 508, 515 (7th Cir. 2004) (because government did not argue forfeiture, court did not consider application of the plain-error doctrine) *with United States v. Koch*, No. 02-6278, ___ F.3d ___, 2004 WL 1899930, at *12 (6th Cir. Aug. 26, 2004) (en banc) (Martin, J., dissenting) (government argued that *Apprendi* claim was forfeited and should be reviewed under plain-error standard).

decide." Sup. Ct. R. 24.1(a). Thurston contends that the sentencing enhancements imposed by the district court constitute plain error under *Blakely*. *See United States v. Koch*, No. 02-6278, ___ F.3d ___, 2004 WL 1899930, at *12-13 (6th Cir. Aug. 26, 2004) (en banc, 9-5 decision) (Martin, J., joined by Daughtrey, Moore, Cole, and Clay, JJ., dissenting) (concluding that sentence enhancements imposed by district court constituted plain error under *Blakely*, while reserving judgment as to whether harmless-error review is appropriate given that *Blakely* decided subsequent to defendant's sentencing).

Further, there is no risk that the government will be prejudiced by the proposed amendment to the petition. One of the added questions is identical to the Sixth Amendment question being briefed and argued by the government in the *Booker* and *Fanfan* cases. And the other question results from the confluence of the Sixth Amendment principles being briefed and argued there, and the particular sentence enhancements and departure issues already presented by the certiorari petition here.

For these reasons, the Court should grant this motion to amend the certiorari petition. For the same reasons, as well as the reasons set forth in the Amendment bound herewith, the original filed certiorari petition, and the supplemental brief in support of the petition, the Court should grant the petition, including the Amendment. In the alternative, this Court should defer ruling on this motion or the certiorari petition or both until the Court decides *Booker* and *Fanfan*. Then if the Court were to find that, in light of those decisions, this case presents questions worthy of review, the Court could grant certiorari on all or a subset of the questions, concurrently granting this motion if appropriate. If the Court were instead to find none of the questions worthy of briefing and argument, it could nonetheless summarily reverse, or, if appropriate, it could grant, vacate, and remand for reconsideration in the lower courts in light of *Booker* and *Fanfan*. *See* 28 U.S.C. § 2106 ("The Supreme Court ... may affirm, modify,

vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."); Sup. Ct. R. 16.1 (providing for "summary disposition on the merits").

CONCLUSION

The motion to amend the petition for a writ of certiorari should be granted. Alternatively, the motion should be held and decided in light of this Court's decisions in the *Booker* and *Fanfan* cases, Nos. 04-104 and 04-105.

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September 2004

No. 03-1670

In The

Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

AMENDMENT TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In addition to the three questions presented in the original filed petition for a writ of certiorari, this case presents the following questions:

4. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

5. If the answer to the question above is not an unequivocal "yes," the following question is presented: Whether imposition of such an enhanced sentence violates the Sixth Amendment when the sentencing judge's fact-intensive decision to depart from the applicable guideline range is subject to nondeferential *de novo* review, or when the sentencing judge is prohibited by law from departing based on a disparity between the sentences of similarly situated co-defendants.

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* This section of Thurston's original petition contained argument headings I-III, corresponding to the three questions presented. This Amendment continues with headings IV-V, corresponding to the two additional questions presented.

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AMENDMENT TO PETITION FOR A WRIT OF CERTIORARI

William Thurston respectfully amends his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

See the original petition, at page 1.

STATEMENT OF JURISDICTION

See the original petition, at page 1.

CONSTITUTIONAL PROVISIONS INVOLVED

This amendment to the petition involves the Sixth Amendment to the Constitution of the United States, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

In addition to the statement contained in the original petition, at pages 2-7, the following statement is relevant to this amendment to the petition.

The base offense level for violation of 18 U.S.C. § 371, Thurston's crime of conviction, was six. Based on facts found by the judge under a preponderance-of-the-evidence

standard, not by the jury under a reasonable-doubt standard, Thurston's sentence was increased by twenty levels:

> This is my ruling with respect to the offense level. A base offense level of 6, an aggravated role in the offense which is 4, more than minimal planning which is 2, and an intended loss of 14, which adds up to an offense level of 26. That makes the range between 63 months and 78 months.

Pet. App. 203a-204a.[1] Based solely on the jury's general verdict of conspiracy to defraud, the applicable guidelines range would be zero to six months' imprisonment. *See* U.S.S.G., Sentencing Table. Once the district court imposed the enhancements, however, Thurston's sentence increased to a range of sixty-three to seventy-eight months' imprisonment, *see id.*, capped by 18 U.S.C. § 371 at sixty months. U.S.S.G. § 5G1.1(a); 18 U.S.C. § 371; 28 U.S.C. § 994(b)(1).

Thurston challenged each of these factual findings and attendant offense-level enhancements in the district court, and the fourteen-level intended-loss enhancement on appeal. Thurston's App. in 1st Cir. 1502-1520 (objections to presentence report); Gov't App. in 1st Cir. 117-125 (sentencing brief); *id.* 318-348 (oral argument at sentencing); Thurston's Opening Brief in 1st Cir. 78-84; Thurston's Reply Brief in 1st Cir. 58-61. Given the controlling authority at the time of trial, sentencing, and appeal, well before *Blakely* was

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[1] The base offense level and enhancements correlate to the following provisions of the Guidelines: United States Sentencing Commission, *Guidelines Manual* (Nov. 1992) [hereinafter U.S.S.G.] § 2X1.1(a) (providing base offense level for conspiracy to defraud is same as for fraud); *id.* § 2F1.1(a) (providing base offense level for fraud is six); *id.* § 2F1.1(b)(1) (providing for fourteen-level increase for "loss" greater than $5,000,000, up to $10,000,000); *id.* § 2F1.1(b)(2) (providing for two-level increase "[i]f the offense involved [ ] more than minimal planning"); *id.* § 3B1.1(a) (providing for four-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive"). The November 1992 Guidelines were used to avoid retroactivity problems.

decided, Thurston did not interpose a Sixth Amendment challenge to the sentencing enhancements. The sentencing judge departed downward on two grounds from offense level twenty-six to level ten, Pet. App. 212a-213a, 233a-234a, but the First Circuit reversed the departure on both grounds, remanding for imposition of the statutory maximum sentence of five years' imprisonment. *Id.* 63a-64a.

REASONS FOR GRANTING THE WRIT[2]

IV. This Case Squarely Presents the Sixth Amendment Question This Court Will Decide in *Booker* and *Fanfan* Regarding Sentence Enhancements Under the Federal Guidelines.

1. Eight days after Thurston filed his original petition for a writ of certiorari in this case, this Court decided *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004). In *Blakely*, the Court applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that a criminal sentence imposed under Washington state law violated the Sixth Amendment to the extent it was based on facts found by a judge rather than found by a jury or admitted by the defendant. Specifically, the Court applied the following rule: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490). The Court held:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after

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[2] This section of Thurston's original petition contained argument headings I-III, corresponding to the three questions presented. This Amendment continues with headings IV-V, corresponding to the two additional questions presented.

> finding additional facts, but the maximum he may impose *without* any additional findings.

124 S. Ct. at 2537 (emphasis in original).

As Justice O'Connor correctly noted, "there is no map of the uncharted territory blazed by [the Court's] unprecedented holding" in *Blakely*. *Id.* at 2547 n.1 (O'Connor, J., dissenting) (collecting federal and state authority, and explaining that "[p]rior to today, only one court [the Kansas Supreme Court, reviewing Kansas state law] had ever applied *Apprendi* to invalidate application of a guidelines scheme"). One court has stated that "*Blakely* redefined 'statutory maximum.'" *United States v. Booker*, 375 F.3d 508, 514 (7th Cir. 2004), *cert. granted*, No. 04-104, ___ S. Ct. ___, 2004 WL 1713654 (Aug. 2, 2004); *see also Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting) (explaining that "[u]nder the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense" and "must now be charged in an indictment and submitted to a jury"). Given this "sea change in the body of sentencing law," *United States v. Ameline*, 376 F.3d 967, 973 (9th Cir. 2004), the lower courts have been in doubt about whether the federal Guidelines are unconstitutional, and they have reached differing conclusions. *Compare, e.g.*, *Booker*, 375 F.3d 508, and *Ameline*, 376 F.3d 967, *with United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004), *petition for cert. filed*, No. 04-5263 (July 14, 2004). In the wake of *Blakely*, the Court recently granted certiorari and ordered expedited briefing in *United States v. Booker*[3] and *United States v. Fanfan*[4] to decide whether the Sixth Amendment is likewise violated by imposition of an enhanced sentence under the United States Sentencing Guidelines.

2. The first Sixth Amendment question (question four in this petition) is squarely presented by this case, just as it

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[3] 375 F.3d 508.

[4] *United States v. Fanfan*, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004) (partial tr. of sentencing hr'g), *cert. granted before judgment*, No. 04-105, ___ S. Ct. ___, 2004 WL 1713655 (Aug. 2, 2004).

is in *Booker* and *Fanfan*. Thurston's sentence was enhanced by twenty offense levels under the federal Guidelines based on judge-determined facts regarding the amount of intended loss associated with a conspiracy to defraud the United States, the extent of the planning associated with the conspiracy, and Thurston's role in the offense. Pet. App. 203a-204a. *See supra* at 1-2 & n.1. These facts were not found by a jury beyond a reasonable doubt, nor were they admitted by Thurston. Instead, they were found by the judge under a preponderance-of-the-evidence standard. Thurston contested these enhancements—in his objections to the presentence report, in his sentencing brief, during oral argument at sentencing, and on appeal. *See supra* at 2.

By granting certiorari in *Booker* and *Fanfan*, this Court has already judged the Sixth Amendment question to be sufficiently important to warrant review. This case presents the identical question, albeit on a different set of facts. Both *Booker* and *Fanfan* are relatively simple drug cases. In *Booker*, the sentence was enhanced based on a finding of drug quantity and obstruction of justice. In *Fanfan*, enhancements for drug quantity and aggravating role in the offense were at issue. In contrast, this is a complex, "white-collar" case alleging conspiracy to defraud the United States where the enhancements were for intended loss, more than minimal planning, and aggravating role in the offense.[5]

3. The fact that Thurston did not mount a Sixth Amendment challenge in the district court or court of appeals before *Blakely* poses no obstacle to this Court's granting certiorari. This

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[5] Thurston petitions for a writ of certiorari on this and another Sixth Amendment question, *see infra* section V. In the alternative, he asks that the petition be held and decided once the Court decides *Booker* and *Fanfan*, at which time summary disposition may be appropriate. *See infra* at 9-10. The questions presented in the original filed certiorari petition—pertaining to the retroactivity and interpretation of the PROTECT Act, the scope of *de novo* review of departures, and the availability of disparity-based departures—continue to be worthy of review by this Court, independent of this amendment to the petition.

Court's constitutional decisions, including those announcing new rules, apply retroactively to all cases pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314 (1987). Although the Court normally does not review an issue not pressed or passed on below, in exceptional cases, it will. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540-41 (1999) (resolving legal standard although court below did not reach issue); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (deciding question not pressed, although decided, below, because the issue was "in a state of evolving definition and uncertainty, and one of importance to the administration of federal law") (internal quotation marks and citations omitted); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (deciding question of law even though not addressed by lower court); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) (same); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (deciding question not pressed or decided in district court or court of appeals, because "[i]t [was] an important, recurring issue and [was] properly raised in another petition for certiorari being held pending disposition of this case," and "the interests of judicial administration will be served by addressing the issue on its merits").

Whether this issue in this case will ultimately be reviewed under a harmless-error or a plain-error standard should not affect the Court's grant of certiorari. Even if Thurston were deemed to have forfeited this claim of error in the courts below,[6] this Court could grant certiorari. The

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[6] Thurston does not concede forfeiture in the circumstances presented here. He strongly objected to and thoroughly argued against the twenty-level sentence enhancements under U.S.S.G. §§ 2F1.1(b)(1), 2F1.1(b)(2), and 3B1.1(a) before they were imposed. The government has taken inconsistent positions on whether failure to object in the district court on *Apprendi* grounds constitutes forfeiture in similar circumstances. *Compare Booker*, 375 F.3d 508, 515 (7th Cir. 2004) (because government did not argue forfeiture, court did not consider application of the plain-error doctrine) *with United States v. Koch*, No. 02-6278, ___ F.3d ___, 2004 WL 1899930, at *12 (6th Cir. Aug. 26, 2004) (en banc) (Martin, J., dissenting) (government argued that *Apprendi* claim was forfeited and should be reviewed under plain-error standard).

Court has overlooked the plain-error rule and reached the merits when confronted with a question that is "currently in a state of evolving definition and uncertainty[,] . . . is important[,] and appears likely to recur." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256-57 (1981) ("conclud[ing] that restricting our review to the plain-error standard would serve neither to promote the interests of justice nor to advance efficient judicial administration"). Moreover, even when a question is excluded from a certiorari petition, "the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." Sup. Ct. R. 24.1(a). Thurston contends that the sentencing enhancements imposed by the district court constitute plain error under *Blakely*. *See United States v. Koch*, No. 02-6278, ___ F.3d ___, 2004 WL 1899930, at *12-13 (6th Cir. Aug. 26, 2004) (en banc, 9-5 decision) (Martin, J., joined by Daughtrey, Moore, Cole, and Clay, JJ., dissenting) (concluding that sentence enhancements imposed by district court constituted plain error under *Blakely*, while reserving judgment as to whether harmless-error review is appropriate given that *Blakely* decided subsequent to defendant's sentencing).

V. This Case Presents an Important Sixth Amendment Issue Involving the Interplay Between Sentence Enhancements and a Sentencing Judge's Discretion to Depart.

1. The second Sixth Amendment question (question five in this petition) is presented by this case because not only was Thurston's sentence enhanced in the first instance, but the sentencing judge's downward departure, which offset sixteen of the twenty levels of enhancements, was reversed on both grounds by the court of appeals under a nondeferential *de novo* review standard that the court interpreted the PROTECT Act[7] to

[7] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

require. This case, distinct from the *Booker* and *Fanfan* cases, therefore raises an important issue involving the interplay between the enhancements to a defendant's sentence and the sentencing judge's discretion to depart from the applicable guideline range.

This issue was suggested by the Brief of *Amici Curiae* An Ad Hoc Group of Former Federal Judges In Support of Neither Party, filed September 1, 2004 in *Booker* and *Fanfan*. There, *amici* argue that sentence enhancements based on judge-found facts under the Guidelines do not violate the Sixth Amendment because sentencing judges have "significant" and "substantial" power to depart from the otherwise applicable guideline range. Brief of *Amici Curiae* at 5-6, 9-10, 13-24. "[T]he federal Guidelines contain sufficient judicial discretion so as not to trigger a defendant's right to a jury trial on any of the many factors that may conceivably increase an individual defendant's sentence." *Id.* at 5-6. The Guidelines system, *amici* argue, "is more analogous to the traditional indeterminate scheme" than to the "determinate statutory sentencing scheme at issue in *Blakely*." *Id.* at 9-10. Directly undermining this argument, however, are the following two problems conceded by *amici*: (1) that restrictions on sentencing judges' departure power wrought by the PROTECT Act "may constitute an unconstitutional restriction on district court discretion in light of *Blakely*" (although the Act is not at issue in either *Booker* or *Fanfan*), *see id.* at 18 n.2; and (2) "some circuit courts of appeal[s] have clearly failed to recognize the breadth of the departure power that *Koon* [*v. United States*, 518 U.S. 81 (1996)] acknowledged and, in those circuits, the Guidelines in effect operate as a determinate scheme," *id.* at 19.

Thurston's case squarely presents the fact pattern in which to test the two Sixth Amendment problems with federal sentencing identified by the former federal judges' *amicus* brief. The First Circuit, in conflict with other circuit courts of appeals' post-*Koon* decisions, declared one ground on which the sentencing judge's departure was based—the disparity between Thurston's sixty-month sentence and a more culpable, non-cooperating co-conspirator's probation-only sentence—to be unavailable as a matter of law. *See* Petition

for a Writ of Certiorari at 6, 21-30. Additionally, the First Circuit reversed on the second departure ground—Thurston's strong record of charitable works and community service, which the sentencing judge found the most extraordinary he had seen in fourteen years of sentencing—after holding the PROTECT Act's *de novo* review provisions applicable, and determining *de novo*, with no deference to the sentencing judge's experience and expertise, that Thurston did not qualify for such a departure. *See id.* at 6-7, 18-21.

In short, through the operation of the PROTECT Act's new departure-restricting provisions, as well as the First Circuit's failure to afford the breadth of departure discretion required by *Koon*, Thurston was subjected to a scheme more akin to determinate sentencing. The Court should grant certiorari to determine whether the Sixth Amendment is offended by a system that requires a judge to find facts and impose sentence enhancements, yet simultaneously eviscerates that judge's discretion to depart to reach a just, individualized sentence.

Thurston's case would present this different but related Sixth Amendment question even if the Court were not to invalidate the sentences in *Booker* and *Fanfan*. Those cases involve sentence enhancements under the Guidelines but not in conjunction with departure decisions. Thus, even if the Court were to hold the application of the Guidelines constitutional in those cases, there remains the issue whether the Sixth Amendment is violated where a judge enhances the sentence based on facts that were not found by a jury beyond a reasonable doubt, in circumstances in which the judge lacks sufficient discretion to depart from the otherwise applicable guideline range.

2. For the same reasons set forth in section IV.3, *supra*, there are no obstacles to the Court's granting certiorari on this question.

For these reasons, as well as the reasons set forth in the motion bound herewith, the original filed certiorari petition, and the supplemental brief in support of the petition, the Court should grant the petition, including this Amendment. In the

alternative, this Court should defer ruling on the certiorari petition until the Court decides *Booker* and *Fanfan*. Then if the Court were to find that, in light of those decisions, this case presents questions worthy of review, the Court could grant certiorari on all or a subset of the questions. If the Court were instead to find none of the questions worthy of briefing and argument, it could nonetheless summarily reverse, or, if appropriate, it could grant, vacate, and remand for reconsideration in the lower courts in light of *Booker* and *Fanfan*. *See* 28 U.S.C. § 2106 ("The Supreme Court ... may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."); Sup. Ct. R. 16.1 (providing for "summary disposition on the merits").

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be held and decided in light of this Court's decisions in the *Booker* and *Fanfan* cases, Nos. 04-104 and 04-105.

Respectfully submitted,

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